

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than five percent permanent impairment of the left lower extremity, for which he has received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 17, 2017 appellant, then a 55-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he sprained his left thigh and upper leg when he lost his footing and slipped on mud and ice while in the performance of duty. He stopped work on January 18, 2017. OWCP accepted the claim for a strain of the left thigh muscle. On June 30, 2017 appellant underwent an OWCP-authorized left L3-4 foraminotomy and microdiscectomy. OWCP subsequently expanded acceptance of the claim to include L3-4 disc protrusion and lumbar radiculopathy secondary to left L3-4 disc protrusion. It paid appellant wage-loss compensation on the supplemental rolls from March 4 until May 26, 2017.

In an impairment evaluation report dated April 25, 2019, Dr. Neil Allen, a Board-certified internist and neurologist, obtained a history of appellant's January 17, 2017 employment injury and discussed his continued complaints of back pain radiating into the left thigh. On examination he found some thigh and calf atrophy, intact sensation, and full strength of the lumbar spine and left hip. To ascertain the range of motion (ROM), Dr. Allen performed three measurements of the left hip, with the highest measurement yielding 70 degrees flexion, plus 6 degrees extension, 45 degrees external rotation, 55 degrees internal rotation, 61 degrees abduction, and 24 degrees adduction. Dr. Allen found 10 percent permanent impairment of the left lower extremity due to loss of ROM. Referencing *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), which is a supplemental publication of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ Dr. Allen found no sensory or motor impairment of either lower extremity due to a spinal condition. He determined that using the diagnosis-based impairment (DBI) method for the diagnosis of hip strain yielded a lower extremity impairment rating between five and seven percent. Dr. Allen reported that the ROM method resulted in a greater impairment rating.

On May 22, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

³ Docket No. 20-1146 (issued December 18, 2020).

⁴ (6th ed. 2009).

On October 8, 2019⁵ Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, concurred with Dr. Allen's finding that appellant had no impairment of either lower extremity due to a spinal nerve impairment under *The Guides Newsletter*. He found that ROM was not permitted as an alternative impairment rating for the applicable class of diagnosis (CDX) of left hip strain. Dr. Katz found that a CDX of hip strain with mild motion deficits was a Class 1 impairment, which yielded a default value of two percent of the left lower extremity according to Table 16-4 on page 512 of the A.M.A., *Guides*. He applied a grade modifier for functional history (GMFH) and a grade modifier for physical examination (GMPE) of one each and indicated that a grade modifier for clinical studies (GMCS) was inapplicable. Dr. Katz utilized the net adjustment formula and found no change from the default value of two percent. He concluded that appellant had two percent permanent impairment of the left lower extremity.

By decision dated October 22, 2019, OWCP granted appellant a schedule award for two percent left lower extremity permanent impairment. The period of the award ran for 5.76 weeks from April 25 to June 4, 2019.

On November 19, 2019 counsel requested a review of the written record before a representative of OWCP's Branch of Hearings and Review and submitted an addendum report from Dr. Allen dated November 14, 2019, in which he opined that the ROM method yielded 10 percent permanent impairment due to loss of hip flexion, and thus was preferable to the DBI method as it resulted in a higher impairment rating.

By decision dated March 23, 2020, an OWCP hearing representative affirmed the October 22, 2019 schedule award decision.

On May 13, 2020 counsel filed an appeal with the Board. By decision dated December 18, 2020, the Board set aside the March 23, 2020 decision and remanded the case to OWCP for clarification from the DMA as to whether the accepted conditions included a left hip strain and whether appellant had a mild or moderate motion deficit of the left hip.⁶

On January 6, 2021 OWCP requested clarification from the DMA, Dr. Katz, as to whether the accepted conditions included a left hip strain. It also requested he clarify his left lower extremity impairment rating using Table 16-4 and to explain his finding that appellant had only mild motion deficit given that Dr. Allen found he had moderately reduced hip ROM.

In an addendum dated January 7, 2021, Dr. Katz noted that appellant's accepted left thigh strain encompassed the left hip. He again found that ROM was not permitted as an alternative impairment rating for the applicable CDX of left hip strain. Dr. Katz found that a CDX for hip strain with moderate motion deficits, which is a Class 1 impairment, yielded a default value of five percent of the left lower extremity according to Table 16-4 on page 512 of the A.M.A., *Guides*. He applied a GMFH and a GMPE of one each and indicated that GMCS was inapplicable. Dr. Katz

⁵ The report notes the year as "2018" which appears to be a typographical error as OWCP referred the claim to the DMA on September 26, 2019.

⁶ *Supra* note 3.

utilized the net adjustment formula and found no change from the default value of five percent. He concluded that appellant had five percent permanent impairment of the left lower extremity.

By decision dated January 27, 2021, OWCP granted appellant an additional three percent schedule award for left lower extremity permanent impairment, for a total five percent left lower extremity permanent impairment. The period of the award ran for 8.64 weeks from June 5 to August 4, 2019.

On February 25, 2021 counsel requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By decision dated June 16, 2021, OWCP's hearing representative affirmed the January 27, 2021 schedule award decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁷ and its implementing regulations⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁰

In determining permanent impairment of the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the hip, the relevant portion of the leg for the present case, reference is made to Table 16-4 (Hip Regional Grid) beginning on page 512.¹¹ After the CDX is determined from the Hip Regional Grid (including identification of a default grade value), the net adjustment formula is applied using GMFH, GMPE, and GMCS. The net adjustment

⁷ *Supra* note 2.

⁸ 20 C.F.R. § 10.404.

⁹ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ *L.E.*, Docket No.20-1505 (issued June 7, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ A.M.A., *Guides* 512-15 (6th ed. 2009).

formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹² Under Chapter 2.3, the evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹³

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than five percent permanent impairment of his left lower extremity, for which he previously received schedule award compensation.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's March 23, 2020 merit decision because the Board considered that evidence in its December 18, 2020 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁵

On prior appeal, the Board remanded the case to OWCP to request clarification from the DMA as to whether the accepted conditions include a left hip strain, and whether appellant had a mild or moderate motion deficit of the left hip. In a report dated January 18, 2021, Dr. Katz again found that ROM was not permitted as an alternative impairment rating for the diagnosis of left hip strain. Dr. Katz found that a CDX of hip strain with moderate motion deficits, which is a Class 1 impairment, yielded a default value of five percent of the left lower extremity according to Table 16-4 on page 512 of the A.M.A., *Guides*. He applied a GMFH and a GMPE of one each and indicated that GMCS was inapplicable. Dr. Katz utilized the net adjustment formula and found no change from the default value of five percent. He concluded that appellant had five percent permanent impairment of the left lower extremity.

The Board finds that Dr. Katz adequately explained how he arrived at his rating of permanent impairment by listing specific tables and pages in the A.M.A., *Guides*. The Board also finds that Dr. Katz properly interpreted and applied the standards of the sixth edition of the A.M.A., *Guides* to conclude that appellant qualified for five percent permanent impairment of the left lower extremity. Dr. Katz's opinion therefore represents the weight of the medical evidence and supports that appellant has five percent permanent impairment of the left lower extremity.

¹² *Id.* at 515-22.

¹³ *Id.* at 23-28.

¹⁴ *See supra* note 9 at Chapter 2.808.6(f) (March 2017).

¹⁵ *T.R.*, Docket No. 20-0588 (issued June 25, 2021); *A.G.*, Docket No. 18-0329 (issued July 26, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than five percent permanent impairment of his left lower extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 24, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board